SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 64760

DIXIE CARRIERS, INC., ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CIVIL ACTION NO. 9544.

JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.
CIVIL ACTION NO. 9544.

JURISDICTIONAL STATEMENT.

In compliance with Rules 13 and 15 of the Rules of the Supreme Court, The Atchison, Topeka and Santa Fe Railway Company and other intervening railroad defendants-appellants, as shown in Appendix A hereto attached, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

OPINION BELOW.

The opinion of the District Court is reported in 143 F. Supp. 844. The court's opinion and its final judgment are reproduced in Appendices B and C, respectively, hereto attached.

JURISDICTION.

This action was brought under Sections 1336, 1398, 2284, and 2321-2325 of Title 28, United States Code, Section 17(9) of Title 49, United States Code, and Section 1009 of Title 5, United States Code to set aside, annul, and suspend interlocutory orders of the Interstate Commerce Commission issued under Sections 4(1) and 15(7) of Title 49, United States Code. The judgment of the District Court was entered on August 20, 1956. Notice of appeal was filed in that court on October 18, 1956 by these defendants-appellants, and separate notices of appeal were filed also by the Interstate Commerce Commission and by the United States of America, defendants-appellants.

The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Sections 1253 and 2101(b) of Title 28, United States Code, and is sustained by the following decisions: *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; and *American Trucking Assns.* v. *United States*, 344 U. S. 298.

STATUTES INVOLVED.

Sections 4(1), and 15(7) of the Interstate Commerce Act (49 U. S. C., Sections 4(1) and 15(7)); and Sections 8(b) and 10(e) of the Administrative Procedure Act (5 U. S. C., Sections 1007(b) and 1009(e)), are reproduced in Appendix D, hereto attached.

QUESTIONS PRESENTED.

1. Is an Interstate Commerce Commission order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Did the District Court err in holding invalid, and restraining the enforcement of, an order vacating the suspension of rates, after such rates had gone into effect and prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Is the Interstate Commerce Commission required to hold a hearing before granting temporary relief from the prohibitions of 49 U. S. C., Section 4(1)?

5. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, granting temporary relief from the prohibitions of 49 U. S. C., Section 4(1)?

6. Do competing carriers have standing to challenge orders issued by the Interstate Commerce Commission pursuant to 49 U. S. C., Section 4(1)?

7. Did the District Court err in holding invalid, and restraining the enforcement of, an order granting temporary relief from the prohibitions of 49 U. S. C., Section 4(1), after the rates involved had gone into effect and prior to a final Interstate Commerce Commission decision on whether to grant permanent relief?

STATEMENT OF THE CASE.

On September 16, 1955, rail carriers participating in the movement of pipe from the East and the South to the Southwest published reductions in their rates, which reductions were scheduled to become effective October 26, 1955. At the same time the railroads filed with the Interstate Commerce Commission Fourth Section Application No. 31120 in which relief was sought from the applicability of the so-called "long and short haul" provisions of Section 4(1) (49 U. S. C. Sec. 4(1)) of the Interstate Commerce Act; the application in question was a necessary corollary in making the reduced rates effective.

Certain water carriers and motor carriers thereupon filed with the Commission requests for suspension of such rates, and for refusal of the "long and short haul" relief sought by the railroads, which in turn filed replies to said requests.

On October 20, 1955 the Commission, acting through its Board of Suspension, an employee group, entered an order suspending the effective date of the proposed rates to and including May 25, 1956, and instituting an investigation into the lawfulness of the rates, all of which action is authorized pursuant to Section 15(7) (49 U. S. C. Sec. 15(7)) of the Interstate Commerce Act. On October 21, 1955 the Commission, acting through its Fourth Section Board, also an employee group, voted to withhold long and short haul relief pending hearing.

Petitions seeking reconsideration of the order of suspension and for immediate issuance of fourth section relief were forwarded by the railroads to the Commission on October 26, 1955. Petitions in support of said petitions were filed by various shippers and receivers, and

replies in opposition were filed by water carrier and motor carrier interests. The Commission, acting through Division 2 as an appellate division, entered an order on December 7, 1955, to become effective December 17, 1955, vacating the order of suspension, but continuing the investigation of the new rates. On December 9, 1955, the Commission, again acting through Division 2 as an appellate division, entered an order granting fourth section relief until the effective date of the further order to be entered after hearing in Fourth Section Application No. 31120.

Thereafter, eight water carriers and the Waterways Freight Bureau, alleging "serious and irreparable injury" filed this action on February 19, 1956, seeking to have the court set aside, annul, and suspend the Commission's orders of December 7, 1955 and December 9, 1955. Several motor carriers intervened as plaintiffs and the Interstate Commerce Commission and several railroads intervened as defendants.

On August 1, 1956 the court filed its opinion (Appendix B, *infra*) and on August 20, 1956 entered its judgment (Appendix C, *infra*) holding the orders complained of to be invalid and restraining their enforcement.

THE QUESTIONS ARE SUBSTANTIAL.

The decision of the District Court constitutes an unwarranted intrusion into the orderly administration of freight rates by the Interstate Commerce Commission. The decision holds that interlocutory orders of the Commission, issued prior to the holding of formal hearings, must contain detailed findings of fact, and that the failure of the Commission so to amplify its interlocutory orders constitutes a fatal handicap to the validity of such orders.

The decision below is in conflict with the majority of

court decisions upon these and similar questions and fails to give proper effect to the decisions of this Court concerning the scope of the Administrative Procedure Act. Furthermore, the decision, if not reversed, would place formidable obstacles in the way of orderly administration of the Interstate Commerce Act. For example, according to the *69th Annual Report of the Interstate Commerce Commission*, for the period November 1, 1954 to October 31, 1955, the Commission handled 4,019 protested rate adjustments, resulting in 2,033 suspensions in full, 84 suspensions in part, 1,285 permitted to become effective, and 617 otherwise disposed of (protests withdrawn, etc.). Obviously, it would create an intolerable burden to cloak these proceedings with the degree of formality required by the decision below. Furthermore, for the same period, the Commission handled 1,421 applications for fourth section relief and in 90 instances issued orders granting temporary fourth section relief as it did by order of December 9, 1955, in the instant case; the decision below would require formal findings of fact in each instance in which temporary fourth section relief was granted, and impliedly, if not expressly, would not permit a grant of temporary relief prior to a formal hearing.

1. The decision below is at variance with the long accepted principle that preliminary administrative action, such as is involved herein—an order vacating a prior temporary rate suspension order, is not subject to judicial review until the prescribed administrative remedy has been exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385. This principle has been applied consistently to the attempted judicial review of orders suspending rates. *Manhattan Transit Co.* v. *United States*, 24 F. Supp. 174 (D. C. Mass., 1938) (three-judge court); *Ferguson-Steere Motor Co.* v. *United*

States, 126 F. Supp. 588 (N. D. Tex., 1954) (three-judge court); *Humble Oil & Refining Co.* v. *Federal Power Commission*, 236 F. (2d) 819 (5th Cir., 1956). Interstate Commerce Commission orders refusing to suspend rates generally have been held not subject to judicial review without exhaustion of the administrative remedy. *M. C. Kiser Co.* v. *Central of Georgia Ry.*, 236 Fed. 573 (S. D. Ga., 1916), affirmed 239 Fed. 718 (5th Cir., 1917); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E. D. Va., 1935) (three-judge court); *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y., 1952) (three-judge court); *National Water Carriers Assn.* v. *United States*, 126 F. Supp. 87 (S. D. N. Y., 1954) (three-judge court).[1]

In the instant type of situation, involving an interlocutory order vacating a previous interlocutory order of suspension, the decisions are in conflict. The court below insists that exhaustion of the administrative remedy is not necessary, citing as authority *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N. D. Tex., 1956) (three-judge court), probable jurisdiction noted, 352 U. S. 817, and *Long Island R. R.* v. *United States*, 140 F. Supp. 823 (E. D. N. Y., 1956) (three-judge court). On the other hand, the unavailability of immediate judicial review of such orders is strongly indicated in the decisions in *Merchant Truckmen's Bureau* v. *United States*, 16 F. Supp. 998 (S. D. N. Y., 1936), and *Acme Fast Freight, Inc.* v. *United States*, 135 F. Supp. 823 (D. C. Del., 1955).

The court below apparently is of the view[2] that the

1. A decision apparently to the contrary, involving the Federal Maritime Board, is *Isbrandtsen Co.* v. *United States*, 211 F. (2d) 51 (App. D. C., 1954), cert. denied 347 U. S. 990.

2. The same views are expressed in *Amarillo-Borger Express* v. *United States, supra* (decision rendered by same Circuit Judge who rendered opinion in instant case), and in *Long Island R. R.* v. *United States, supra* (decided upon the authority of the *Amarillo-Borger Express* case).

Administrative Procedure Act permits judicial review generally of interlocutory administrative orders without first exhausting the prescribed administrative remedy, which remedy was not followed in the instant case, inasmuch as the Commission has not yet reached a decision, on the merits, as to the lawfulness of the involved rates. In this respect, the court below has ignored the interpretation of the Administrative Procedure Act by this Court in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499-500, that:

> "That Act purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review."

In addition to its reliance upon the decision in *Amarillo-Borger Express* v. *United States, supra,* the court below has cited *Atlantic Seaboard Corp.* v. *Federal Power Commission,* 201 F. (2d) 568 (4th cir., 1953), and *Phillips Petroleum Co.* v. *Federal Power Commission,* 227 F. (2d) 470 (10th cir., 1955), cert. den. 350 U. S. 1005; in each case, however, the challenged order was beyond the statutory powers of the Commission; no such issue is present here.

2. The decision below held invalid an interim order of the Commission vacating a previous suspension order, and did so on the ground that the Commission failed to support its order with findings as required by Section 8(b) of the Administrative Procedure Act (5 U. S. C. Sec. 1007(b)) reproduced in Appendix D hereto. Section 8 of the Administrative Procedure Act is expressly limited by its own terms to

> "'* * * cases in which a hearing is required to be conducted in conformity with Section 7 * * *.'"

Section 7, in turn, relates to

> "'* * * hearings which Section 4 or 5 requires to be conducted pursuant to this section. * * *'"

Section 4 is concerned with rule making and Section 5 is restricted to

> "• • • every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. • • •"

The legislative history of the Administrative Procedure Act shows that Congress intended that the provisions of Section 8 should apply only to administrative orders issued after hearing. Thus, the Senate Committee Report of 1945 stated (p. 209):

> "Like section 7, upon which section 8 depends, this section is supplementary to sections 4 and 5 in cases in which agency action is required to be taken after hearing provided by statute and not otherwise excepted from the operation of sections 4 or 5."

(p. 194):

> "Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. In each case, where other statutes require opportunity for an agency hearing, sections 7 and 8 set forth the minimum requirements for such hearings and the agency decisions thereafter, while section 11 provides for the appointment and tenure of examiners who may participate." (Senate Committee Report, 1945, S. Doc. 248, 79th Cong., 2d Sess.)

This Court has held that the requirements of Section 8(b) of the Administrative Procedure Act are applicable only in instances in which there is a statutory requirement of a hearing. *American Trucking Assns.* v. *United States*, 344 U. S. 298, 320.

Interim orders relating to the suspension of rates are not dependent upon the holding of a hearing. The Commission's powers relating to the suspension of rates are derived from Section 15(7) of the Interstate Commerce Act

(49 U. S. C. Sec. 15(7)), reproduced in Appendix D hereto, and which provides, in part that

> "* * * *pending such hearing* and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect. * * *" (Emphasis supplied.)

Since the holding of a hearing is not a necessary prerequisite to orders relating to the suspension of rates, such orders are not affected by Section 8(b) of the Administrative Procedure Act.

3. The District Court held invalid the Commission's interim order vacating the suspension of rates, and entered an order restraining the enforcement of the Commission's order after the involved rates had been in effect for several months and before the Commission had reached a final decision on the merits.

The court below, having concluded that the doctrine of exhaustion of administrative remedies was inapplicable to the interim order vacating the suspension of rates, and that the provisions of Section 8(b) of the Administrative Procedure Act required that such interim order contain "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues", also has found the interim order reviewable pursuant to Section 10(e) of the Administrative Procedure Act (5 U. S. C. Sec. 1009(e)), reproduced in Appendix D hereto. Section 10(e) of the Administrative Procedure Act authorizes reviewing courts to set aside agency action found to be "without observance of procedure required by law". However, the court below

lost sight of the fact that Section 10 of the Administrative Procedure Act, by its own terms, is inapplicable where "agency action is by law committed to agency discretion".

Administrative action by the Interstate Commerce Commission relating to the suspension of rates is an excellent example of agency action which is "committed to agency discretion" and which therefore is not subject to the provisions of Section 10 of the Administrative Procedure Act. Thus, in *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 429, it was stated:

> "This power of suspension was entrusted to the Commission only."

The District Court also overlooked the expression in *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 130 F. Supp. 76, 78 (E. D. Mo., 1955) (three-judge court), affirmed 350 U. S. 892, wherein it was stated:

> "Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided."

The court below, in reliance upon inapplicable provisions of the Administrative Procedure Act, has interfered with the administrative discretion of the Interstate Commerce Commission, and by its judgment has, in effect, ruled that the involved rates should be suspended despite the fact that the Commission previously had ruled that the rates should not be suspended and would, at some time in the future, decide whether the involved rates were or were not lawful within the requirements of the Interstate Commerce Act.

4. Although the court below professed not to decide the point, its decision and the underlying reasoning strongly indicate that temporary fourth section relief can be granted

by the Commission only after a formal hearing. The court below, in the same manner in which it treated the question of the Commission's order vacating the suspension of rates, has concluded that Section 8(b) of the Administrative Procedure Act requires formal findings to support orders granting temporary relief from the provisions of Section 4(1) of the Interstate Commerce Act (49 U. S. C. Section 4(1)), reproduced in Appendix D hereto.

The District Court found Section 8(b) of the Administrative Procedure Act to be applicable upon the theory that temporary approval of fourth section relief applications is an integral part of an investigation on the lawfulness of rates which must be determined after a hearing. Although the court stated that it "need not decide" whether temporary fourth section relief prior to a hearing was permissible, elsewhere in the opinion the court referred to the language in Section 4(1) of the Interstate Commerce Act authorizing fourth section relief "after investigation" and quoted from a decision stating that the phrase "after investigation" implied a hearing. *Louisville & Nashville R. R.* v. *United States,* 225 Fed. 571 (W. D. Ky., 1915) (three-judge court); affirmed 245 U. S. 463. The question of whether a hearing must be held before temporary fourth section authority may be granted was not determined in the cited case, for the issue there was whether a final order of the Commission, issued after hearing, which denied, in part, fourth section relief, was valid.

There is no authority in support of the proposition that a formal hearing is a prerequisite to a grant of temporary fourth section relief. Nevertheless, there is substantial authority in support of the proposition that the requirement "after investigation" found in Section 4(1) of the Interstate Commerce Act does not require a formal hearing, and thus the Commission's order of December 9, 1955,

granting temporary fourth section relief until such time as the effective date of a final order after hearing, was not affected by Section 8(b) of the Administrative Procedure Act. In *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152, this Court held that a statutory direction to an administrative agency to "investigate" did not include the requirement of a formal hearing. To the same effect, see *Securities and Exchange Commission* v. *Torr*, 15 F. Supp. 144 (S. D. N. Y., 1936); *Woolley* v. *United States*, 97 F. (2d) 258, 262 (9th cir., 1938), cert. den. 305 U. S. 614; *Bowles* v. *Baer*, 142 F. (2d) 787, 788-789 (7th cir., 1944); *Genecov* v. *Federal Petroleum Board*, 146 F. (2d) 596, 598 (5th cir., 1945), cert. den. 324 U. S. 865.

Congress has not made a formal hearing a requirement before granting temporary fourth section relief. If that had been the intent of Congress, it could have explicitly provided for a hearing as it has done in other sections of the Interstate Commerce Act, such as Sections 1(14), (15), (21); 3(1a); 5(1), (2)(b), (7), (15); 13(3), (4); 15(1); (3), (6), (7), (13); 16(1); 19a(i); 20a(6). See *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F. (2d) 281, 285-287 (App. D. C., 1948).

In addition, the practice of granting temporary fourth section relief without a hearing is not a recent development; for example, in 1939 the Commission authorized 328 grants of temporary authority, and did so in 295 instances in 1940 (Interstate Commerce Acts Annotated, Volume 11, S. Doc. 250, 77th Cong., 2d sess., p. 9164). In 1940, when Congress amended Section 4(1) of the Interstate Commerce Act (49 U. S. C. Section 4 (1)), the following proviso was added:

> "* * * *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission

under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

It is plain that the requirement of "one day's notice" implies that Congress intended prompt consideration of applications for fourth section relief, and the additional requirement of a hearing prior to granting temporary relief, and the necessary additional time required for such hearing, should not be implied. It should also be emphasized that Congress enacted the 1940 amendment, without the requirement of a hearing, in the face of the fact that the Commission regularly had been granting temporary fourth section relief without requiring hearings; surely Congress would have made specific requirement for hearings if that had been its intent.

5. The court below, having decided, at least by implication, that a formal hearing is a prerequisite to a Commission order granting temporary fourth section relief, held that said order was invalid because it did not contain the detailed findings of fact required by Section 8(b) of the Administrative Procedure Act. As pointed out in our discussion of Question 2 on appeal, Section 8(b) of the Administrative Procedure Act is not applicable unless a formal hearing is required, and in our discussion of Question 4 on appeal, we pointed out that an order granting temporary fourth section relief must be preceded only by an "investigation" and not necessarily by a "hearing". Therefore Section 8(b) of the Administrative Procedure Act is not applicable here.

6. The court below concluded that competing carriers have the right to bring court action to invalidate an order granting temporary fourth section relief.

In the instant case the fourth section relief was granted to, and at the request of, rail carriers, including these ap-

pellants. Requests for denial of such relief were made before the Commission by water carriers and motor carriers, and the plaintiffs in the court action are water carriers and motor carriers. The court below held that such competitive carriers, by reason of alleged threatened losses of traffic, had the right to seek judicial review of the grant of temporary fourth section relief.

In so holding, the court below, it is submitted, was not fully aware of the purposes and functions of the long and short haul provisions of the Interstate Commerce Act (49 U. S. C. Section 4 (1)). Proceedings under Section 4 are within the sole discretion of the Commission, and relate primarily to relationships between carriers, on the one hand, and shippers or receivers, on the other hand, rather than to relationships between groups of competing carriers.

In *United States* v. *Merchants & Manufacturers Traffic Assn.*, 242 U. S. 178, 188, in holding that a three-judge court had no power to restrain the enforcement of an order granting fourth section relief, this Court stated:

> "For the order is permissive merely. The carrier is the only necessary party to the proceedings under §4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them."

Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487 (E. D. Va., 1935) (three-judge court), resembles the instant case strongly in that an injunction suit (brought by a shipper rather than by a competing carrier), attacked both the Commission's failure to suspend and its positive action in granting fourth section relief. In dismissing the action, the court stated (11 F. Supp. 492):

> "In the first place, it is to be noted that the only orders passed by the Commission were for fourth-sec-

tion relief and modification or suspension of existing rate orders of the Commission; and that these two orders are of themselves purely incidental to the main purpose of the proceeding before the Commission.

* * * * *

(495) "As has been pointed out, it is not shown that these two orders prejudicially affect the plaintiffs. What does affect them is the failure of the Commission to suspend the new rates. But this again was clearly within the administrative discretion of the Commission under Section 15(7) of the act. * * *"

So here, also, the plaintiffs were not directly affected by the order granting temporary fourth section relief; what really affected plaintiffs was the Commission's failure to suspend the new rates. If a shipper has no right to seek judicial review of an order granting fourth section relief, then *a fortiori* a competing carrier has no such right, even though the court below believes that competition for traffic affords a sufficient basis for such alleged right. The District Court's conclusion in this respect is not in harmony with the conclusion reached in *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 130 F. Supp. 76 (E. D. Mo., 1955) (three-judge court), affirmed 350 U. S. 892, in which it was held that competitive rail carriers had no standing to contest the validity of a Commission order permitting one motor carrier to acquire control of a second motor carrier. The court declared (130 F. Supp. 79):

"Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no 'definite legal right' to be immune from this competition and, therefore, are not 'parties in interest' who may maintain this suit."

7. The District Court held invalid the Commission's interim order granting temporary fourth section relief, and

entered an order restraining the enforcement of the Commission's order after the involved rates had been in effect for several months and before the Commission had reached a final decision on the merits of the issues under Section 4(1) of the Interstate Commerce Act.

As in the case of the interim order vacating the suspension of rates, the court found that the doctrine of exhaustion of administrative remedies was inapplicable, that the provisions of Section 8(b) of the Administrative Procedure Act required that such interim fourth section order contain detailed findings, and that the interim fourth section order was reviewable pursuant to Section 10(e) of the Administrative Procedure Act.

As in the case of orders involving suspension of rates, an interim order granting temporary fourth section relief is a matter committed to agency discretion by Section 4(1) of the Interstate Commerce Act and hence, Section 10(e) of the Administrative Procedure Act is, by its own terms, inapplicable. Thus, Section 4(1) of the Interstate Commerce Act provides that

> "* * * upon application to the Commission such common carrier may in special cases, after investigation, *be authorized by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the *Commission may from time to time prescribe* the extent to which such designated common carrier may be relieved from the operation of this section. * * *" (Emphasis supplied.)

In analogous situations involving other types of interim permissive orders the courts have refused to interfere with the Commission's discretion. *Bowen Transports* v. *United States*, 116 F. Supp. 115 (E. D. Ill., 1953) (three-judge court) (involving a Commission order revoking temporary motor carrier operating authority prior to a decision on

the issue of permanent authority); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W. D. Pa., 1955) (three-judge court) (involving order permitting increase in rates prior to consolidated hearing on petition for reconsideration and complaint under Section 13 of the Interstate Commerce Act).

It is submitted that the court below erred in interfering with the Commission's discretion under Section 4(1) of the Interstate Commerce Act when the court, by its judgment, in effect ruled that the Commission should not grant temporary relief from the long and short haul provisions of the Act.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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December 13, 1956.

PROOF OF SERVICE.

I, Harvey Huston, one of the Attorneys for the Railroad Defendants-Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of December, 1956, I served copies of the foregoing Jurisdictional Statement on the several parties to the case as follows:

1. On Dixie Carriers, Inc. et al., plaintiffs, by mailing copies in duly addressed envelopes with air mail postage prepaid, to their attorneys of record, Donald Macleay and Francis W. McInerny, 1625 K Street, N. W., Washington 6, D. C.; Harry C. Ames and Harry C. Ames, Jr., Transportation Building, Washington 5, D. C.; T. S. Christopher, Continental Life Building, Fort Worth 2, Texas; Alan S. Dale, 212 Cotton Exchange Building, Houston 2, Texas; and (first class postage prepaid) Nuel D. Belnap, One North LaSalle Street, Chicago 1, Illinois.

2. On Joe D. Hughes, Inc., et al., intervening plaintiffs, by mailing a copy in a duly addressed envelope with air mail postage prepaid to their attorney of record, John C. Ridley, Niels Esperson Building, Houston, Texas.

3. On the United States of America, defendant, by mailing copies in duly addressed envelopes with air mail postage prepaid to the Solicitor General, Washington 25, D. C.; John H. Earle, Department of Justice, Washington 25, D. C.; and Gordon Kroll, Assistant United States Attorney, Houston, Texas.

4. On the Interstate Commerce Commission, intervening defendant, by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel, and H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

Harvey Huston

HARVEY HUSTON

APPENDIX A.

The Railroad Defendants-Appellants Are as Follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Wabash Railroad Company.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas,
Houston Division.

Dixie Carriers, Inc., Gulf-Canal Lines, Inc., Mississippi Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., Waterways Freight Bureau, *Plaintiffs*, *vs.* United States of America, *Defendant.*	Civil Action No. 9544.

Before BROWN, *Circuit Judge*, HANNAY and INGRAHAM, *District Judges*, BROWN, *Circuit Judge*:

Involving the vacating of an Order suspending proposed rates, this case[1] is a parallel of *Amarillo-Borger Express* v. *United States* (N. D. Tex.-three-Judge), 138 F. Supp. 411, and the variation in *The Long Island Railroad Company* v. *United States* (ED N. Y.-three-Judge), 140 F.

1. Complaint filed February 16, 1956, by eight specified, certificated Water Carriers and Waterways Freight Bureau to set aside orders of the Interstate Commerce Commission, 49 U. S. C. A. 17(9); 28 U. S. C. A. 1336, 1398, 2284, 2321 to 2325; and Section 10 of the Administrative Procedure Act, 5 U. S. C. A. 1009.

Supp. 823, expressly approving it. We too, without the necessity of restating the matter so fully developed there, adopt the opinion, conclusion and reasoning of that case. The only substantial factual difference is that here the proposed rates required express Section Four approval by the Commission under the Long and Short Haul provision, 49 USCA 4(1) of the National Transportation Act, 49 USCA 1 *et seq.*

The Railroads, to regain a competitive position lost to interstate Water and Motor Carriers largely as the result, they claimed, of voluntary *ex parte* increases (*Ex Parte* 162, 166, 168, 175) in railroad rates, on September 19, 1955, published (to become effective October 26, 1955) drastic reductions in their rates for the movement of steel and wrought-iron pipe, in carloads, moving from the mills in the industrial areas East of the Mississippi River to destinations in the States of Arkansas, Louisiana, Oklahoma and Texas. Concealed in the lexicography of the complex tariff papers is the battle for transportation revenues running annually, it is asserted, from $6,000,000.00 to $9,000,000.00 and constituting about 15% of water carrier revenues for the movement of fabricated steel pipe for current and immediate use in the oil fields and for pipeline transmission facilities in the great Southwest.

This case does not involve the question of the extent of the right, so often asserted by the Railroads, as a part of management responsibility to publish reduced rates to meet competition, see *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, M. D. Ala., 104 F. Supp. 193, 198, and which would, subject only to the possibility of suspension for a seven months period under 49 USCA 15(7), make them effective until determined by hearing to be unlawful. For here, by the choice of the Railroads, the proposed rates were less for the longer distance from the steel mill areas to rail-head delivery points in the Southwest than

rates for the movement of the same commodity for shorter distances within both origin and destination territories. They were thus confessedly in violation of the Act[2] *unless*, upon application and after investigation by the Commission finding it to be a special case, and the rates reasonably compensatory for the services performed, express approval were given.

Consequently, as permitted by the Act, the Railroads simultaneously filed (September 19, 1955) Fourth Section Application No. 31120 for approval of the rates. But until the Fourth Section Application was granted, the rates could not go into effect. Conversely, so long as they were suspended, they could not be effective and approval under Fourth Section would be a sterile, useless academic decision.

Water and Motor Carriers then filed Protests against Fourth Section approval and Petitions for Suspension, each of which normally are administratively handled by separate Boards[3] of Commission employees. On October

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2. Sec. 4 [as amended June 18, 1910, February 28, 1920, August 9, 1935, September 18, 1940], 49 U. S. C. A. 4: "(1) It shall be unlawful for any common carrier subject to this part or Part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance • • •: *Provided*, That upon application to the Commission such common carrier may in *special cases, after investigation*, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; • • •, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is *not reasonably compensatory* for the service performed; • • •." [Italics supplied].

3. 49 U. S. C. A. 17(2). The suspension proceeding was identified as I & S [Investigation and Suspension] Docket No. 6491. Fourth Section approval was under FSA 31120.

20, 1955, the Suspension Board, on positive findings[4] identical with *Amarillo-Borger, supra,* ordered an investigation into the lawfulness of the rates and suspended them for the full seven months to May 25, 1956. With the rates suspended, there was nothing which the I. & S. Board could do on FSA 31120.

The Railroads, presumably accepting the findings, note 4, *supra,* as an adequate, articulate "statement in writing of [the Commission's] reasons for such suspension"[5] since no complaint by them has yet been made, filed on October 26, 1955, a Petition in I. & S. 6491 for reconsideration of the suspension order and, on the same day, filed in FSA

4. The Order October 20, 1955, in 6491 stated (numbers in [ ] added to identify stated reasons for action):

"*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be [1] unjust and unreasonable in violation of the Interstate Commerce Act and [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy and [3] be in contravention of the provisions of Section 4 of the Interstate Commerce Act, without appropriate authority • • •."

In two "corrected" orders later entered but bearing the same date occasioned by technical errors in tariff descriptions, the phrase "in contravention of the National Transportation Policy" was inadvertently omitted from finding [2] so that [2] read, "and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 • • •."

The Railroads (see their brief pages 31, 32, footnote 1) find significance in this omission, but the last "corrected" order of December 7, 1955, entered March 2, 1956, note 13, *infra,* restating the negative of findings [1], [2], and [3] completely dispels this.

5. 49 U. S. C. A. 15(7): "Whenever there shall be filed with the Commission any schedule stating a new • • • rate • • • the Commission shall have • • • authority • • • to enter upon a hearing concerning the lawfulness of such rate • • •; and pending such hearing and the decision thereon the Commission, upon • • • delivering to the • • • carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such • • • rate • • • but not for a longer period than seven months beyond the time when it would otherwise go into effect • • •."

31120 a "Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Application herein, dated September 16, 1955." This was not[6] a Petition for reconsideration and those preparing and proposing it treated it as a Petition for initial action on the original Fourth Section Application.

Through Commission administrative channels the Petition for Reconsideration of the Suspension Order came before Division 2 acting as an appellate division. On December 7, 1955, by an Order[7] in all respects identical with that roundly condemned in *Amarillo-Borger, supra,* the Suspension Order was vacated, and on December 9, 1955,

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6. No Order of any kind was ever entered or served in FSA 31120 until the Order of December 9, 1955. While an undisclosed Minute Entry of the Fourth Section Board, 21 October 1955, states, "Voted to withhold relief pending hearing, and to assign the above application for hearing with I & S, No. 6491", it is of no consequence as no action was, or could then have been, taken and to be effective, it must have been communicated to interested parties affected by it, 49 U. S. C. A. 14(1)(2), 17(5); 5 U. S. C. A. 1002, which was not done.

The Railroads' Petition FSA 31120 itself reflects this: "As the Suspension Board suspended the involved rates, the question of issuing Fourth Section authority at this time became moot and the Fourth Section board has *neither granted nor denied* the Railroads' application. However, as a petition for vacation of the order of suspension is filed concurrently, the question is *revived* and this petition is therefore filed • • •" [Emphasis supplied].

The Prayer stated: "Wherefor these applicants pray that this Commission issue appropriate Fourth Section authority sought by Fourth Section Application No. ICC 31120."; and compare this with the document filed simultaneously in I & S 6491, denominated a "Petition • • • for Reconsideration" and opens, "Come now the railroads in • • • I & S 6491 and petition this Honorable Commission for *reconsideration* of the Order of the Suspension Board • • •." [Emphasis supplied.]

7. I & S 6491, December 7, 1955: "*It further appearing,* That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; *and good cause appearing therefor;* • • •" See note 6, Amarillo-Borger, 138 F. Supp. at 414, 415.

an order of ambiguous[8] origin was entered granting temporary Fourth Section relief effective December 17, 1955.

The Water and Motor Carriers then filed separate Petitions for Reconsideration of the Orders of December 7 and 9 requesting in those Petitions the Stay granted by the Act[9] where the initial Order is handed down by a Board or Division. By notice dated December 15, 1955, the full Commission declined to act and on the following day, December 16, notice and order were issued[10] denying the Petitions in I & S 6491.

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8. The actual order, made on December 9, as served December 29, 1955, showed at its heading: "At a session of the Interstate Commerce Commission, Division 2, acting as an Appellate Division • • •" but closed: "By the Commission, Fourth Section Board. Harold D. McCoy, Secretary."

A corrective order dated December 9, 1955, was entered March 2, 1956, after this case had been assigned to this Three-Judge Court. It deleted reference to the Fourth Section Board and substituted: "By the Commission, Division 2, acting as an Appellate Division."

By a still later order purporting to be entered December 16, 1955, but actually entered April 27, 1956, this was again changed by reciting that the order of December 9, 1955, was by Division 2 "acting as an Appellate Division, upon consideration of a petition by respondents requesting that the action of the Fourth Section application No. 31120, • • • be reversed • • •."

9. 49 U. S. C. A. 17(8): "Where application for rehearing reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

10. The notice, December 15, 1955, is captioned I & S 6491 and refers to "Petitions • • • seeking reconsideration • • • by the Commission of appellate action of Division 2 in which the Division modified the action of the Board of Suspension." This was merely a ruling that the Petitions would be considered by

Thus the matter stood when, on February 16, 1956, this verified complaint was filed. And on that record, we are of the clear opinion that the Order of December 7, vacating the prior suspension, is invalid. The simple phrase "and good cause appearing therefor" is inadequate to upset

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the appropriate appellate division pursuant to Item 8.4 Organization Minutes of the Commission 20 Fed. Reg. 5031, 5035, and Rule 101(g).

The notice, December 16, and formal order of the same date likewise refer solely to I & S 6491 and the order, December 7, 1955, vacating the prior order, October 20, 1955, suspending the rates.

11. The Court summed it up this way 138 F. Supp. at pages 417 and 420:

"But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, 'and good cause appearing therefor'.

"If the cryptic phrase 'good cause appearing' is a sufficient indication of action, it will be a self-generating bar to any review since, 'the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based,' Securities and *Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80, 63 S. Ct. 454, 459, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a 'lack of the basic or essential findings required to support the Commission's order,' *State of Florida* v. *United States*, 282 U. S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 465, 55 S. Ct. 268, 79 L. Ed. 587; *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 224, 71 S. Ct. 264, 95 L. Ed. 225; *Cantlay & Tanzola, Inc.* v. *United States*, (D. C. S. D. Calif.) (three-Judge), 115 F. Supp. 72; *State of North Carolina* v. *United States*, 325 U. S. 507, 65 S. Ct. 12, 60, 89 L. Ed. 1760; *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, D. C., 104

prior positive findings, and for the reasons[11] set forth in *Amarillo-Borger* cannot, on judicial review,[12] stand.

Fed. Supp. 193; *Pacific Island Tariff Bureau* v. *United States*, D. C., 129 Fed. Supp. 472. • • •

"What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase 'good cause appearing' to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase 'good cause appearing,' determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the 'reasons or basis therefor.'"

12. To similar attacks made here, as there, the following may be added to *Amarillo-Borger's* exposition:

(a) Competitors immediately, adversely and financially affected have standing to sue as parties for a review: Note 9, *Amarillo-Borger* and *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 14, 15, 86 L. Ed. 1229, 1236, 1237; *National Coal Association* v. *Federal Power Commission*, D. C. Cir., 191 F. 2d 462, 464-466; *Associated Industries* v. *Ickes*, 2 Cir., 134 F. 2d 694, 699-704; *Cia. Mexicana de Gas* v. *Federal Power Commission*, 5 Cir., 167 F. 2d 804, 805.

(b) An Order vacating suspension has adequate finality for review; see, *Amarillo-Borger*, 138 F. Supp. at 420, syllabus 10, 11; *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 4 Cir., 201 F. 2d 568; *Phillips Petroleum Company* v. *Federal Power Commission*, 10 Cir., 227 F. 2d 470; for reviewability is determined by the intrinsic nature of the order and its practical impact upon the business under regulation and not by the mere tag or label affixed to it: *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 86 L. Ed. 1563; *Frozen Food Express* v. *United States*, 351 U. S. 40, .. L. Ed. ..; *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, .. L. Ed. ...

(c) Administrative Procedure Act, 5 U. S. C. A. 1001 *et seq*, applies to I. C. C. proceedings: *Amarillo-Borger*, *supra*, 138 F. Supp. at 417; *Coyle Lines* v. *United States*, E. D. La., 115 F. Supp. 272, 275; *Atlanta and Saint Andrews Bay Railway Co.* v. *United States*, 104 F. Supp. 193 at 200; *Chicago & E. I. R. Co.* v. *United States*, S. D. Ind., 107 F.

Nor, do we think, does the matter stand differently because of subsequent efforts[13] of the Commission to indicate

Supp. 118, 124. Section 8 (5 U. S. C. A. 1007) applies for suspensions and temporary approval of Fourth Section applications are integral parts of investigations on the lawfulness of rates which must, of course, be determined upon hearings, see, *e.g.*, 49 U. S. C. A. 15(1) "whenever, after a full hearing • • •"; 15(7) "• • • the Commission shall have authority • • • to enter upon a hearing concerning the lawfulness • • •"; so that, while prescribing rates is so-called "rule making" under Section 1 (5 U. S. C. A. 1001), the substantive statutes requiring the hearing thereby invoke Section 4 (5 U. S. C. A. 1003(b)) and Section 7 (5 U. S. C. A. 1006). The Transportation Act likewise requires full adequate statement of Commission action, 49 U. S. C. A. 14(1) (2); 17(5).

(d) That the granting or denial of suspensions requires the Commission to exercise sound judgment and discretion does not under Section 10, Administrative Procedure Act, 5 U. S. C. A. 1009, class suspension orders as nonreviewable: *Amarillo-Borger, supra*, 138 F. Supp. at 418, note 13; commenting on the legislative history (summarized note 13, *Amarillo-Borger*), the Supreme Court stated, *Heikkila* v. *Barber*, 345 U. S. 229, 231, 97 L. Ed. 972, 976: "The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that §10 greatly expanded the availability of judicial review • • •". The Court's purpose to apply the Administrative Procedure Act to reinvest in Courts the full power and responsibility of the Judiciary, *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, 95 L. Ed. 456, is reflected in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51, 52, 99 L. Ed. 868, 873, declining to forbid judicial review under the 1952 Immigration Act: "Such a restrictive construction • • • would run counter to §10 and §12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action • • •. It is more in harmony with the generous review provisions of the Administrative Procedure Act • • •." "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed • • •", *Marcello* v. *Bonds*, 349 U. S. 302, 310, 99 L. Ed. 1107, 1116; *Air Line Dispatchers Association* v. *National Mediation Board*, D. C. Cir., 189 F. 2d 685, 688, 689; *Ford* v. *United States*, 5 Cir., 230 F. 2d 533, 534.

13. On March 2, 1956, a "corrected order" of December 7, 1955, in I & S 6491 was entered, substituting for the "and good cause appearing", paragraph of that original order, note 7, *supra*,

that it had in fact met the teachings of that case. This was not a permissible *nunc pro tunc* order correcting clerical, ministerial errors or omissions. It was an attempt to substitute reasons where none had appeared[14] or been recorded. Moreover, we agree with *Long Island Railroad Company, supra,* 140 F. Supp. 823 at 828 (in which, at the very same time, March 1, 1956, a similar "corrected order" was entered), applying *Amarillo-Borger* that in the face of positive, strong findings of probable illegality merely to restate the conclusion in negative form is inadequate. We do not regard this in a technical light at all. If administrative agencies, no matter how highly motivated their particular action may be, can, under the form of *nunc pro tunc* corrective orders, presumably "correct" the subject order to meet the objections specifically urged in a petition for judicial review, effective review would be denied. The vice of the "and good cause appearing" technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action. That is compounded if, on a challenge, review is then thwarted by substituting something else. There is

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the following (numbers in [ ] corresponding to the initial stated reasons, see note 4 *supra,* are added):

"*It further appearing,* That consideration has been given to a petition by respondents, filed October 26, 1955, requesting vacation of the order of suspension, and of replies by [lists 5 protestants] thereto, and upon reconsideration of the previous action taken in this proceeding, we are reasonably satisfied that the said schedules if permitted to become effective would not [1] result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act or [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy or [3] be in contravention of the provisions of Section 4 of the Interstate Commerce Act; * * *"

14. The Minute Entry, Division 2, Appellate Division, I & S 6491, December 7, 1955, merely states: "Voted to grant the petition to vacate the order of suspension but to continue the proceeding of investigation."

no way to tell whether, in the processes of deliberation and adjudication, the Division meant "and good cause appearing" to be the negative of the initial suspension findings or something different. Whatever it was, "these suitors were justly entitled to a recital of what it was that indicated the disappearance of the prima facie case, and the necessity for an investigation, namely, that the announced result was the exercise of a discretion based upon sound reasoning", *Long Island Railroad Company, supra,* 140 F. Supp. 823 at 828.

The order of December 7, 1955, vacating the suspension must therefore be set aside, and the matter remanded to the Commission for further and not inconsistent proceedings. The question is not the simple one of a suspension beyond the statutory maximum of seven months (expired May 25, 1956) for this is all intertwined[15] with the Fourth Section Application. And rates which have been approved under the Fourth Section Application which would not, and could not, have been effectually determined so long as the rates were suspended, must resume their former status.

That leads us to the plaintiffs' further contention that under these circumstances the Order of December 9, 1955, approving the Fourth Section Application is invalid. In this they contend that *temporary* approval (*i. e.*, pending a hearing) is not authorized by the statute and is hence ineffective. But this is a point we need not decide.

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15. It is plain that all of the action was interdependent. *E.g.* the initial oral hearing October 17, 1955, was before a joint session of the Suspension and Fourth Section Boards; the Fourth Section Application was in abeyance as long as the rates were suspended; and the order of December 7, 1955, whether considered as impliedly finding the negative of reason [3] of the Suspension Order (note 4, *supra*) or expressly doing so by the "corrected order" of March 2, 1956 (note 13, *supra*) in holding that said schedules would not "* * * be in contravention of the provisions of section 4 of the Interstate Commerce Act" was a statement patently wrong *unless* it was certain that such rates had been approved as a "special case" under 49 U. S. C. A. 4.

As in the case of suspensions, we are not at this time claiming or exercising the existence of a power to determine whether the proposed rates were a "special" case meriting approval. We are concerned with the narrower, but still important, question of whether the procedures thus far followed by the Commission are in accordance with law.

Assuming, *arguendo*, that temporary relief may be granted and that the "investigation" required by Section 4 to permit that temporary relief need not be the full dress adversary hearing required before final determination of the lawfulness of the proposed rates, we think there must be some determination and disclosure of the basic reasons why temporary relief is granted. Unless this is done, there is no way for those immediately affected—*e. g.*, "short haul" shippers who pay higher rates, intermediate communities, or competing carriers—[16] to ascertain whether action having a devastating potential is the product of reason and judgment within the mandate of the National

16. It would be unrealistic if, as claimed by the Railroads, competing carriers whose economic life is imperiled, *Columbia Broadcasting System* v. *United States, supra; United States* v. *Storer Broadcasting Company, supra; Frozen Food Express* v. *United States, supra,* have no standing to invoke review. They have ample standing, see note 12, *supra;* and at least two (see (2) and (3) of the criteria, Transcontinental Cases of 1922, 74 ICC 48, 71, which applicants must affirmatively meet to satisfy the underlying requirement of a "reasonably compensatory" rate expressly deal with the effect on competitors: "In the light of these and similar considerations, we are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not to be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the act. • • •"

Transportation Policy to "recognize and preserve the inherent advantages of each" mode of transportation and preserve a "national transportation system by water, highway and rail * * * adequate to meet the needs of the commerce of the United States * * *" or is, on the other hand, hasty, ill-considered action creating undue and illegal preferences.

Nor is there any way for a Court on petition of any such interested and aggrieved parties to test its legality. So-called temporary approval is that in name only for, unlike suspensions which carry a statutory maximum, the Fourth Section approval may continue for many months or years until the investigation[17] hearings are completed and judicial review exhausted. So far as the affected competing carriers are concerned, the approval is a definite, positive act having final characteristics, *Phillips Petroleum Company* v. *Federal Power Commission, supra; Atlantic Seaboard Corporation* v. *Federal Power Commission, supra,* for even though the ultimate decision disapproves the rates

17. Hearings on the investigation ordered (and never rescinded) by the initial Suspension Order October 20, 1955, note 4, *supra,* were held early in 1956 and the matter is now awaiting an Examiner's proposed report. Control of timing and presentation at the various stages may be beyond the immediate parties since the matter was heard and is being considered on a consolidated record with cases of Steel Pipe—East to Southwest, Docket No. 31860 and FSA 31860. It may be further complicated since the proposed Fourth Section rates are constructed on the lowest barge and on-carrying motor truck tariffs, a substantial portion of which traffic now moves by motor carriers holding Oil Field Haulers' ICC permits so that, the plaintiffs assert, the ultimate action of the Commission in I & S 6491 may be affected by MCC 1891 General Investigation Oil Field Equipment, Materials, Supplies To and Between the Southwest, which likewise awaits Examiner's report. In either or all of these proceedings, the rules permit exceptions and appeal to the appropriate Division followed by exceptions and Petition for Reconsideration to the Full Commission. The parties, on argument, except to agree that the time would be substantial, were unable to estimate when the final order after final review would become final.

and denies the Fourth Section Application, the traffic lost to them in the interim is irretrievable, and no means exists to recoup losses from shippers or the other carriers who have enjoyed the benefit of the Fourth Section rates.

This is in harmony with the philosophy of Section 4 that variations from its sweeping prohibitions are permitted, *Intermountain Rate cases*, 234 U. S. 476, 58 L. Ed. 1408, only in *special* cases, and then only after investigation affords the basis for a conclusion that it is "special." Before the Commission can permit that which the statute forbids, at least two things must be reflected: (1) that it is a "special" case, and this means something more than a label as such; and (2) that its classification as a special case has been determined by "an investigation"—a very important condition since, "The requirement of section 4 that such authorization shall be made, if at all, 'after investigation' clearly implies that the question shall be determined upon testimony and after a hearing", *Louisville & N. R. Co.* v. *United States*, W. D. Ky. (three-judge), 225 Fed. 571, 580, affd. 245 U. S. 463, 62 L. Ed. 400; and see note 12(c), *supra*. For administrative action permissible only under limited circumstances after satisfying statutory conditions, it is plain that this is the type of situation which Congress had in mind in requiring that "all decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; * * *", Section 8, Administrative Procedure Act, 5 USCA 1007.

This is particularly so where, as here, by strong emphatic language condemning the rates for specific reasons (note 4, *supra*) and generally as violative of the criteria of *Transcontinental Cases of 1922*, note 16, *supra*, relief is first

denied but, without any other or further showing, is then granted. Courts and administrative agencies have, and must have, power to change their minds. But if it is the rule of law which controls, there must be some basis to indicate that it is reason and judgment that has brought about the change.

All of this is aggravated by the fact that this serious question of whether competing water and motor carriers are to be exposed to what they describe as "suicidal" rates for the indefinite period of investigation, has been treated too much as a matter of pure paper form. When the verified complaint and supporting memorandum brief filed here pointed out that these protestants were entitled, 49 USCA 17(8), note 9, *supra,* to a stay of the order of December 9, 1955 (stated to have been issued by the Fourth Section Board, note 8, *supra*), until decision by Division 2, the Commission on March 2, 1956, "corrected" that to make it appear that this was by Division 2 acting as an appellate division. But since Division 2 could act only as an appellate division on a matter *appealed* to it for reconsideration, the Commission then entered, on April 27, 1956, a still further corrected order of December 16 stating, contrary to available record facts (note 6, *supra*) that Division 2 was "acting as an appellate division, upon consideration of a petition by respondents [Railroads] requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section Application No. 31120 * * * be reversed * * *."

The action of Division 2 was not appellate. It was initial. Pending decision on the petition for reconsideration of that action of December 9, the protestants were entitled to a stay. An order entered months after the judicial review has been set in motion and based on recitations not borne out by the available record does not change it. On

the contrary, it dramatizes again the danger, under our system, of circumventing judicial review by claiming to find and then belatedly record that which was known in fact but imperfectly reflected in the official papers.

The orders appealed from are, therefore, invalid and for the reasons set forth are set aside and the matter remanded to the Commission for further and not inconsistent proceedings.

REVERSED AND REMANDED TO THE COMMISSION.

.....

United States Circuit Judge.

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United States District Judge.

.....

United States District Judge.

APPENDIX C.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Southern District of Texas,
Houston Division.

DIXIE CARRIERS, INC., ET AL.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.
} Civil Action No. 9544.

JUDGMENT.

BE IT REMEMBERED, that on May 18, 1956, in the above-entitled and numbered case wherein Dixie Carrier, Inc., Gulf Canal Lines, Inc., Mississippi Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., and Waterways Freight Bureaus are Complainants; Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros. —J. M. English Truck Lines, Inc., Southwest Oilfield Transportation Co., and Prather Truck Lines, Inc. are Intervening Complainants; the United States of America is Defendant; the Interstate Commerce Commission is Intervening Defendant, and the carriers by railroad listed in Appendix A of this Judgment are likewise Intervening Defendants, the trial upon its merits came on regularly to

be heard before a Court of three judges convened pursuant to law. All parties appeared by Counsel and the merits of the case were fully presented and the matter was submitted to the Court.

Thereafter, and on August 1, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed orders are invalid and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, by the Court that (1) the order of the Interstate Commerce Commission entered on December 7, 1955, in its Investigation and Suspension Docket No. 6491, and as subsequently amended by corrective order bearing the same date, and (2) the order of the Interstate Commerce Commission entered on December 9, 1955, responsive to Fourth Section Application No. 31120, identified as Twenty-Sixth Supplemental Fourth Section Order No. 17160, and as amended by corrective order bearing the same date, be, and the same are hereby, declared to be invalid, and said orders are hereby set aside and their enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the matter out of which the enjoined orders arose, be, and the same is hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings.

RENDERED AND DONE this 17 day of August, 1956.

FOR THE COURT:

/s/ JOHN R. BROWN,
United States Circuit Judge.

for: ALLEN B. HANNAY,
United States District Judge.

for: JOE INGRAHAM,
United States District Judge.

APPROVED FOR ENTRY:

DONALD MACLEAY,
Attorney for Complainants.

JOHN C. RIDLEY,
Attorney for Intervening Complainants.

JOHN H. EARLE,
Attorney for United States of America.

H. NEIL GARSON,
Attorney for Interstate Commerce Commission.

PALMER HUTCHESON, JR.,
Attorney for Intervening Defendant Railroads.

Appendix A.

The intervening railroads are as follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Wabash Railroad Company

Filed 20 day of August, 1956.

V. Bailey Thomas,
Clerk,
By L. W. Wiech,
Deputy.

APPENDIX D.

(Statutes Involved.)

Interstate Commerce Act, Sec. 4(1) (49 U. S. C. Section 4(1)):

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: PROVIDED, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: AND PROVIDED FURTHER, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and

in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Interstate Commerce Act, Sec. 15(7) (*49 U. S. C. Section 15(7)*):

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in

whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Administrative Procedure Act, Sec. 8(b) (5 U. S. C. Sec. 1007(b)):

In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * * *

SUBMITTALS AND DECISION.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act, Sec. 10(e) (5 U. S. C. Sec. 1009(e)):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

• • • • •

Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.